U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 03 March 2004

CASE NO.: 2002-DCW-7
OWCP NO.: 40-147339

In the Matter of:

JOHN MILLINER,
Claimant,

v.

LION TRANSFER & STORAGE CO.,
Employer,

and

FIREMAN'S FUND INSURANCE CO.,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

Appearances: Gerald Baker, Esq.
Kevin J. O'Connell, Esq.
For Claimant

Sarah O. Rollman, Esq.
For Employer

Before: Stephen L. Purcell
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended ("LHWCA" or "the Act"), 33 U.S.C. § 901, *et seq.*,

applicable under the District of Columbia Workmen's Compensation Act,[1] filed by John Milliner ("Claimant") against Lion Transfer & Storage Company and Fireman's Fund Insurance Company (collectively referred to as "Employer"). The LHWCA provides that in cases of "total disability adjudged to be permanent 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability." *See* 33 U.S.C. § 908(a). Claimant sustained an injury to his right foot on February 21, 1980 while in the course of his employment with Employer. Claimant now seeks permanent total disability compensation pursuant to Section 8 of the Act retroactive to the date of injury, or, alternatively, the date he attained maximum medical improvement. If Claimant is adjudged permanently and totally disabled, he further seeks cost-of-living adjustments pursuant to Section 10(f) of the Act. Lastly, Claimant seeks medical benefits for treatment of his foot and ankle, diabetes, hypertension, mental condition, and conversion of his van to accommodate a wheelchair. Tr. 10-19.

A formal hearing regarding this matter was held in Washington, D.C. on November 4, 2002. All parties were given a full opportunity to present evidence and argument pursuant to the Act and its accompanying regulations. Claimant's exhibits ("CX") 1 through 30, 32, and 36 through 38 were admitted into the record.[2] Employer's exhibits ("EX") 1 through 12,[3] and ALJ exhibits ("ALJX") 1 through 3 were also admitted into evidence.

After the formal hearing, Claimant and Employer submitted briefs on the issues presented herein.[4] Claimant seeks permanent total disability benefits from the date of his February 21, 1980 injury. Claimant's Br. at 1-3,10-14. He also asks that Employer be ordered to pay for certain medical costs including: purchase of a modified van for transportation to and from medical treatment and for activities of daily living; purchase of a motorized wheel chair; payment of costs to modify his home to accommodate his various physical impairments; and reimbursement "for his wife's services that are in the form of medical treatment that has been and continues to be provided free of charge to the carrier." *Id*. at 1-2, 14-15.

Employer does not dispute that Claimant is totally disabled, but it contests his entitlement to an award of permanent disability going back to February 1980 and any retroactive cost-of-living adjustments related thereto. Employer's Br. at 7-19. Employer also disputes Claimant's entitlement to be reimbursed for medical services provided by his wife. *Id*. at 19-21.

---

[1] The LHWCA provides compensation for disability resulting from injuries occurring before July 24, 1982 to employees in certain employments in the District of Columbia. *See Snowden v. Director, OWCP*, 253 F.3d 725, 732 n. 1 (D.C. Cir. 2001).

[2] At the time of the formal hearing, Claimant withdrew CX 31 and CX 33. Claimant's exhibit list also identified certain exhibits which were not then submitted, *i.e*., CX 34 (records of Martha Washington Hospital), CX 35 (reports of Dr. Merrick), CX 36 (reports of Dr. Lewis Owens), and CX 37 (estimate of costs relating to van conversion). The record was thereafter left open for thirty days to allow Claimant to produce those exhibits subject to objection by Employer. Tr. 24. On December 3, 2002, Claimant's counsel submitted copies of records of Dr. Merrick and Dr. Owens, identified in his cover letter as CX 36 and CX 37, respectively. No objection was thereafter raised by Employer, and those two exhibits are admitted into evidence without objection as CX 36 and CX 37, respectively. No records from Martha Washington Hospital or estimate for van conversion were ever submitted by Claimant. Those exhibits are therefore deemed withdrawn.

[3] Employer's counsel withdrew EX 13-14 at the time of the formal hearing. EX 1 and 2 were initially excluded from evidence but, as discussed below, have now been admitted into evidence.

[4] On February 6, 2004, Claimant's counsel informed me that Claimant died "over night between February 2 and 3, 2004." As discussed below, Claimant's death does not extinguish his claim.

On November 25, 2003, I issued an order directing the parties to submit supplemental briefs in this case in light of certain deficiencies in the record noted therein. I also offered the parties the opportunity to present additional evidence at a supplemental hearing if they believed such a hearing was necessary. The parties were further informed that I had reconsidered my ruling with respect to excluding EX 1 and 2 and, for the reasons stated in my November 25, 2003 order, that those exhibits were admitted into evidence.

Both parties have now submitted supplemental briefs, including additional documentary exhibits, and have declined the opportunity to participate in a supplemental hearing. Employer has offered, as an additional exhibit in this case, a copy of a stipulation signed by the parties on June 15, 1988 and received by Deputy Commissioner Janice V. Bryant on June 24, 1988. Claimant also submitted a copy of this document as "Exhibit A" attached to his post-hearing brief. The stipulation is admitted without objection as Joint Exhibit ("JX") 1. A copy of Claimant's Prehearing Statement dated July 5, 2002 (marked as "Exhibit B") and a collection of documents from Nursing Referral Service of Northern Virginia, Inc. (marked as "Exhibit C") were also attached to Claimant's supplemental brief. Employer has not objected to the admissibility of these documents, and they are therefore marked and admitted as CX 39 and 40, respectively. Although the record was thereafter held open to allow either party the opportunity to submit evidence responsive to the other party's supplemental submissions, no further documents have been received. Thus, the record is now closed, and this matter is ready for decision. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory and regulatory provisions, and pertinent precedent.

Stipulations

The parties have stipulated (Tr. 6-14; ALJX 3, JX 1) and I find:

1. That the parties are subject to the Act.

2. That Claimant and Employer were in an employee-employer relationship at all relevant times.

3. That Claimant sustained an injury arising out of and in the course of his employment on February 21, 1980.

4. That Employer agreed to voluntarily pay temporary total disability benefits in accordance with the Act from November 26, 1986 to June 16, 1988 and continuing subject to change in Claimant's medical condition or vocational rehabilitation status.

5. That Employer agreed to pay all reasonable and necessary medical and vocational expenses of Claimant in accordance with the Act.

6. That Employer will pay reasonable and necessary expenses associated with his depression, anxiety, ankle, low back, and hip conditions, making Claimant's van wheelchair accessible, and for his surgical treatment for decubitus ulcers and partial foot amputation.

7. That Claimant's average weekly wage at the time of his injury was $821.40

8. That Claimant's compensation rate is $426.26.

9. That Claimant was at the time of the formal hearing unable to return to his prior employment and permanently and totally disabled.

10. That Employer filed a timely notice of controversion.

Issues Presented

Employer does not dispute, and the record confirms, that Claimant is now permanently and totally disabled. Therefore, the issues presented in this case are:

1. Is this claim an original claim under Section 13 of the LHWCA or a request for modification governed by Section 22 of the Act?

2. When did Claimant's temporary total disability become permanent?

3. Is Claimant entitled to reimbursement for the reasonable value of medical services provided by his wife?

Findings of Fact and Conclusions of Law

Medical and Vocational Evidence

Claimant injured his right foot in the course of his employment with Employer on February 21, 1980.[4] Tr. 6, Claimant's Brief ("Cl. Br.") at 1, Employer's Brief ("Emp. Br.") at 1. In a letter to Employer's Carrier dated May 7, 1980, Dr. Chester A. DiLallo stated that Claimant had "symptoms of neuroma incontinuity of the dorsolateral branch of the peroneal nerve on his right foot . . . [and] continuing discomfort at the antereolateral aspect of his right ankle which represents the residuals of the sprain of his ankle." EX 7. Dr. DiLallo stated that he suggested an injection, but that Claimant indicated that his ankle was "behaving sufficiently well for his return to work." Dr. DiLallo saw "no reason to preclude" Claimant's return to work.

Claimant was apparently dissatisfied with Dr. DiLallo and began treatment with Dr. Nathan Price on May 12, 1980. EX 3. Dr. Price physically examined Claimant's ankle, reviewed previously taken x-rays, performed an arthrogram, and administered physical therapy.

[4] Claimant previously suffered a work-related injury to his right ankle in December 1979, but after five months he was able to return to his pre-injury employment. Tr. 35-36, Emp. Br. at 1-2.

In a June 13, 1980 letter to Carrier, Dr. Price reported that no loose bodies appeared, that Claimant had improved due to the therapy, and that although Claimant's range of motion was not normal, he could walk with a barely perceptible limp. Dr. Price saw "no reason why [Claimant] should not return to work." Dr. Price noted on January 7, 1981 that Claimant had "stabilized with a degenerative ankle that may give him trouble at any time in the future" and suggested a 30% permanent partial disability rating of the entire foot and ankle. On March 30, 1981 Dr. Price noted that Claimant ceased performing moving and storage work because he feared he was more liable to be injured in that line of work than in painting. Dr. Price agreed "with his evaluation" but believed that "he probably could function in his former occupation." On June 11, 1982, Dr. Price examined Claimant's knee and ankle x-rays and noted Claimant's difficulty with finding work due to his condition. Dr. Price found that Claimant's ankle, although sometimes stiff, was "about the same" and had not changed overall. Claimant also reported pain behind his kneecap, which Dr. Price attributed "quite possibly because of some limitation of motion putting extra stress on his knee" and weight gain. On December 22, 1982, Dr. Price performed another ankle x-ray which revealed "no significant progression in the extension degeneration about the ankle" and opined that Claimant's condition and disability remained the same. On June 27, 1983, Dr. Price noted that weather increased Claimant's ankle pain, but that his "condition is unchanged and ankle is the same."

On November 2, 1983, Dr. Clifford Hinkes, based upon physical examination and x-rays, diagnosed Claimant with "[c]hronic injury to the right ankle with resultant early traumatic arthritis." CX 2, EX 6.[5] On December 14, 1983, Dr. Hinkes stated that Claimant had "severe degenerative arthritis due to the traumatic injury of his ankle" and suggested an ankle fusion. Dr. Hinkes performed the ankle fusion on January 5, 1984. CX 1, CX 3. On May 24, 1984, Dr. Hinkes recommended physical therapy "for a few months, perhaps until August 1, 1984." CX 4. He found it "hard to estimate the additional time of temporary total disability," but indicated that Claimant would be allowed to drive a regular car and that he could return to work in four to eight weeks. Dr. Hinkes opined, "I don't really think he will be able to return to his other job as a trucker doing long distance hauling" because his leg would not support the unloading process, but "[h]e is, however, still young and with a normal physical status otherwise, I am sure he could be retrained to do something for which he would be well suited." Progress notes from January 31, 1984 to July 30,1986 indicated that Claimant successfully recovered from the ankle fusion and that he was walking without a cane on July 2, 1984. CX 2, EX 6. Dr. Hinkes completed a form dated August 8, 1984 indicating that Claimant was limited to lifting no more than fifty pounds and could not use his right foot for repetitive movements. EX 8. Dr. Hinkes reported a 35% permanent partial disability on September 17, 1984. CX 2, EX 6. On February 6, 1985, Dr. Hinkes diagnosed lumbar strain and sprain, synovitis of both hip joints, and mild chondromalacia of the left patella. On July 30, 1986, Dr. Hinkes opined that Claimant's "disability remains at 35% of the lower extremity which corresponds to 14% disability of the entire person," and further noted recent mental problems.

In September 1984, Crawford Rehabilitation Services, of Richmond, Virginia, assisted Claimant in searching for employment consistent with his medical limitations. According to a

[5] Employer alleges that it paid "temporary total disability benefits from November 2, 1983 through September 16, 1986. Emp. Br. at 2.

September 12, 1984 vocation assessment report prepared by Melinda Hayes, M.S., C.R.C., Claimant was motivated towards re-employment and should undergo additional short-term academic or on-the-job training to enhance his wage earning capacity. EX 1. Hayes stated that Claimant's prior employment consisted primarily of "bull" work which he was no longer able to perform. *Id*. She suggested employment as a "repossessor [or] order-filler" as consistent with the types of jobs Claimant might be able to learn, and recommend that hypothetical job descriptions be submitted to his treating physician "for recommendation to clarify training feasibilities." *Id*.

Between October 29, 1984 and March 4, 1985, vocational consultants at Crawford reported that Claimant interviewed for a variety of jobs including maintenance, taxi and truck driving, sales, and parking attendant jobs. EX 1, CX 4, 5. Claimant did not receive a job offer from any of the potential employers because Claimant was unable to stand for extended periods, could not climb or lift heavy loads, did not have the required skills, was unable to ambulate with sufficient flexibility or speed, or other candidates had more experience. One employer offered to train Claimant for circuit board assembly at an entry-level salary of $3.50 per hour, but Claimant indicated the wage and distance to the employer made the position infeasible. The vocational consultant reported that the Carrier would be willing to pay the circuit board assembly employer for Claimant's training or other on-the-job training for mechanical skills that would qualify him for a higher salary, but Claimant was despondent because of the number of rejections he had received and the likelihood of substantially less earnings than his previous employment. Correspondence from Crawford personnel to Claimant expressed disappointment regarding Claimant missing appointments with prospective employers and his poor attitude during the interviews he actually attended.

Wayne D. White, M.A., a Certified Vocational Evaluator employed by Rappahannock Service Corporation, performed a vocational evaluation on May 7, 1985. CX 6. White found Claimant to be a very cooperative individual who expressed interest in mechanical type positions and someone who would learn best with an on-the-job training program which required little written instructions. *Id*. at 39. White expressly noted that his recommendations were based on Claimant's past work experience, interests, and test results, but were not based on any labor market research. *Id*. at 40.

A July 17, 1985 letter to Claimant from Pauline E. Mula, an Employment Consultant, with Crawford Risk Management Services, suggests that Milliner failed to show up for a job interview. CX 7. The letter informs Claimant that he must attend scheduled job interviews or contact Mula if he is unable to attend.

A November 20, 1985 letter from Crawford to Fireman's Fund sought permission to refer Claimant to Dr. Edward Peck, a Clinical Psychologist, for eight sessions of therapy to deal with his attitude problem. EX 1. Claimant failed to appear for a December 12, 1985 evaluation by Dr. Peck and a second appointment was scheduled for January 17, 1986. *Id*.

A January 13, 1986 letter to Fireman's Fund from Cynthia L. Harrison, M.S., ATR, of Region Ten Community Services, Louisa County, Virginia, notes that Claimant was seen November 18, 1985 for "stress, depression, because of inactivity due to a left ankle disability."

EX 1. The letter further noted that Claimant was referred to Dr. Siegel for evaluation for antidepressant medication and was being seen weekly for supportive therapy sessions. The diagnosis noted by Harrison for Claimant was continuous major depression for the past several years resulting from Claimant's physical injury and subsequent disability.

Dr. Edward A. Peck, III, a clinical psychologist, examined Claimant for a psychological evaluation on January 17, 1986. CX 8. Dr. Peck reported evidence of "a very significant form of emotional dysfunction characterized by auditory hallucinations, severe depression and unusual thinking . . . [and the] possibility of psychosis cannot be ruled out at the present time." Dr. Peck noted that Claimant's medication could affect his overall response profile and that Claimant possessed "borderline to low average intellectual functioning," and "motor based skills . . . somewhat better than primarily verbal based skills." Dr. Peck concluded that Claimant's emotional status was significantly impaired to a degree where any form of active work involvement was "essentially out of the question . . . [and that Claimant's] emotional status will need to be improved significantly prior to any serious consideration" of vocational training or placement. Dr. Peck recommended "an extremely active treatment program in order to minimize potential for further deterioration in emotional status" and "careful monitoring of the patient's emotional status . . . until the patient's depressive condition is brought under more direct control."

A January 24, 1986 status report from Crawford reflects that Claimant was evaluated by Dr. Peck on January 17, 1986 and found to be "severely depressed and on the verge of being psychotic." EX 1. Hospitalization and treatment were recommended by Dr. Peck, and job placement activities were deemed infeasible at that time.

Dr. David B. Moga, an orthopedic surgeon, examined Claimant on January 30, 1986. CX 10. Claimant had complained of ankle, back, and knee pains and Dr. Moga noted that although the fusion appeared solid, there were some arthritic changes and spurs in the mid tarsal area. Dr. Moga concluded that the fusion left Claimant with "a foot that is in a little bit of varus, also plantar flexion," which made walking "a little difficult." Dr. Moga recommended some alteration in Claimant's shoe and use of anti-inflammatory medicine, but he "did not feel that there was much else he would be able to do about the various pains in his back and knees."

Claimant was admitted to the Medical Center of Charlottesville, Virginia on February 3, 1986 for "suicidal and homicidal ideation, depression, and auditory hallucinations." CX 11. Claimant was examined physically and mentally and underwent various laboratory tests. Claimant was taken off all of his medications except those for his blood pressure, and his condition improved. On discharge, Dr. Betsy Luxford indicated that Claimant was "friendly, ambulatory with his mood bright and cheerful. He is very much improved from admission and he is experiencing no more auditory hallucinations."

A labor market survey by Vocational Counseling Associates, Inc. dated August 19, 1986, notes that Claimant was evaluated May 13, 1985 by Wayne White who determined that Claimant would learn best with an on-the-job training program with little written instructions. EX 2. The survey listed physical restrictions reported by Dr. Clifford Hinkes on August 15, 1986 including, *inter alia*, avoiding bending, squatting, crawling, climbing, crouching, and kneeling, but

permitting frequently reaching above shoulder level and pushing/pulling, continuous balancing, and use of the left foot for repetitive movements in operating foot controls but no use of the right foot. *Id*.

Employer agreed to pay temporary total disability benefits dating from November 26, 1986 pursuant to the 1988 stipulations. JX 1.

Dr. William J. Launder conducted an orthopedic consultation examination on August 13, 1987. CX 12. Dr. Launder performed a physical examination and obtained x-rays of the lumbar spine, pelvis, and right knee, foot, and ankle. He found a 20% permanent partial disability of the back, based upon a 19.5% disability rating due to lack of low back motion combined with back pain. Dr. Launder further found a 51% permanent partial disability of the lower extremity due to Claimant's ankle fusion (30%) combined with the functionally fused subtalar joint in slight inversion (21%). Dr. Launder added that the back and lower extremity impairments covered any additional disability of Claimant's knee.

Dr. Patrick J. Sheehan, a board-certified psychiatrist, examined Claimant on November 20, 1987. CX 14. He found Claimant to be "in a psychotic state and severely depressed and in need of immediate psychiatric care." Dr. Sheehan concluded that "[p]sychiatrically, currently, he is completely disabled and unable to function at any kind of job due to his severe depression and his psychosis."

Dr. Lyn van der Sommen evaluated Claimant on May 10, 1988 in response to Claimant's complaints of neck and back pain after falling the prior week. CX 15. He found "increased development of 'compensatory' neck and back imbalances in his muscles and also probably has non-alignment of facet joints at both levels" due to Claimant's "decreased ability to weight bear on his right foot, his right leg length discrepancy, fatigued muscles secondary to this imbalance, and overall stress-induced muscle contraction of his neck and back." Dr. van der Sommen recommended "ongoing fairly intensive physical therapy to retard deterioration of his overall condition," help with weight reduction, body tone maintenance, and periodic evaluations for arthritis and chronic pain control. He also prescribed a shoe lift on August 9, 1988. CX 16.

According to a November 15, 1988 letter to Claimant's attorney from Betty Overbey, R.N., CIRS, of OccuSystems, Inc., she was meeting that date with Claimant to assess his medical and vocational status for the purpose of developing a rehabilitation plan. EX 1. A report of her evaluation notes that Claimant had been recently evaluated by Dr. Kim Marsh at the request of Dr. van der Sommen and diagnosed with "ankylosing spondylitis" which was not believed to be related to Claimant's work injury. *Id*. Nurse Overbey's progress reports from November 21, 1988 to April 7, 1989 indicated slow physical improvement. CX 19-20.

Dr. Albert M. Jones, Jr. issued a report on March 1, 1989 based upon his examination of Claimant and a review of prior records. CX 21-22. Dr. Jones agreed that Claimant had a right leg "residual disability" and advanced degenerative arthritis of the back, but not ankylosing spondylitis. Dr. Jones found no relationship between the ankle injury and Claimant's hypertension or diabetes, and could not opine whether it led to Claimant's degenerative back problems, but found it reasonable that Claimant's altered gait pattern contributed to his back

pain. Dr. Jones suggested that a rheumatologist administer further specific x-rays and CT scans. Regarding treatment, Dr. Jones recommended continued exercise rehabilitation, non-steroidal anti-inflammatory agents, paraffin heat applications, and custom-fitted shoes. Regarding Claimant's work capacity, Dr. Jones found "it highly unlikely that [Claimant] has the potential to return to any type of manual labor" based on Claimant's third grade reading level and history of employment. He opined that Claimant's "prognosis for vocational rehabilitation is poor" and offered no recommendations other than "a brief three day work capacity evaluation . . . to maximally quantitate his work capacity."

Dr. van der Sommen authored a letter to Carrier dated November 1, 1990, stating that Claimant "has been totally and permanently disabled" due to the chronic pain and instability of his right ankle and resulting low back disorder, and that he did not expect any change in Claimant's disability. CX 17. He indicated that Claimant's then current treatment plan was intended for his "general health" and that "[t]here is no surgery anticipated or available for the degenerating condition of his affected joints." He concluded that no employment was possible, given Claimant's limited education, emotional state, and physical condition, but stated that he would recommend any available and appropriate vocational rehabilitation program.

Dr. Randolph V. Merrick began treating Claimant for his back pain on August 1, 1996. CX 24. Treatment notes of Dr. Merrick reflect a diagnosis of severe chronic pain due to back injury resulting from Claimant's work injury. He subsequently diagnosed severe spinal stenosis on January 23, 1997 after Claimant underwent an MRI which would "probably . . . [result in] compromise of his lower extremities as well as upper extremities." *Id*. at 143, *see also* CX 23. Dr. Merrick also treated an inguinal abscess that had developed in April 1997. *Id*. at 144. He noted chronic pain syndrome, diabetes and hypertension on July 28, 1997, hypercholesteremia on October 6, 1997, and peripheral neuropathy on September 29, 1998. *Id*. at 145-48. A diabetic foot ulcer developed on October 26, 1998, which Dr. Merrick found "secondary to trauma, secondary to physical therapy for the Worker's Comp issue." *Id*. at 149-50. According to a December 23, 1998 treatment note, Claimant then had "[c]hronic pain, depression, diabetes, recurrent foot ulcer secondary to callous secondary to foot deformity secondary to his original industrial accident." *Id*. at 150; *see also* CX 28 (December 1, 1998 podiatric evaluation by Dr. Jimmy W. Downing), EX 11 (February 9, 1999 evaluation by Downing). Diagnoses of diabetes, hypertension, chronic low back, hip, and lower extremity pain, degenerative arthritis in the spine and lower extremities, diabetic foot ulcer, and depression appear in treatment notes from March 1999 through January 2001. *Id*. at 153-160.

In a June 24, 1997, letter to Fireman's Fund Insurance Company, Dr. Merrick wrote that he was Claimant's family physician and had been treating Claimant for chronic pain syndrome, diabetes, depression, obesity, and hypertension. CX 25, EX 9. He noted that Milliner was on "high dose narcotic medication for his pain control as well as Benzodiazepine therapy . . . ." *Ibid*. According to Dr. Merrick:

> The deterioration of [Claimant's] spine continues from his injury and the arthritis it has caused. We are also seeing deterioration of his knees and his ankles due to the stilted posture and pelvis imbalance that the back condition has caused. The patient, although not in a wheelchair, has a hard time walking and walks with a

> cane at all times. He is unable to perform any tasks that require prolonged sitting, standing, or bending, however, with medication he is able to tolerate the pain that he lives with. I don't think there is much that we can offer him from a surgical or medical point of view to improve his back condition and can only really try to keep him pain free.

Ibid.

On August 24, 2000, Claimant was seen by Dr. Harry A. Wellons, Jr., Professor of Surgery at the University of Virginia. CX 29. Dr. Wellons found "no significant peripheral vascular disease" and opined that Claimant "could tolerate a surgical procedure with predictable healing [if necessary]." *Ibid*.

In an August 24, 2001 letter to Gerald C. Baker, Claimant's attorney, Dr. Merrick noted Claimant's many orthopedic problems which he attributed to his original on-the-job injury in 1979 when a piano slipped from a ramp and fell on Claimant, but aggravated by Claimant's 1980 injury. CX 26. Dr. Merrick further opined that the 1980 injury to Claimant's ankle when he jumped over a guardrail to avoid a vehicle "compounded the original injury to the right ankle which later resulted in an orthopedic fusion of that right ankle." *Ibid*. at 164. He attributed Claimant's development of degenerative disc disease and arthritis of the cervical, thoracic, and lumbar spine to "the original crush injury," and noted that Claimant's condition had deteriorated to the extent that he then required an electric wheelchair "to maneuver at most times and is only to ambulate small distances and stand for only small periods of time." *Ibid*. Dr. Merrick prescribed pain medications, including opioids, to facilitate pain relief, and stated that his activities of daily living were severely restricted by his inability to move. *Ibid*. He noted that Claimant required "almost full care for help in bathing and moving as he is restricted in both motion of his back and his neck, as well as the pain from the degenerative right ankle, as well as the arthritis that it has caused in his knees, hips, low back." *Ibid*. He further noted that Claimant was "well cared for by his wife and family members who seek to meet his needs from the standpoint of activities of daily living." *Ibid*. Claimant's depression and anxiety were, according to Dr. Merrick, exacerbated by, *inter alia*, his chronic pain resulting from his multiple injuries and arthritis. *Ibid*. at 165. Dr. Merrick stated that Claimant would have required placement "in an assisted living facility such as a nursing home" if his family had not assisted him with his activities of daily living. *Ibid*. He further described Claimant's prognosis as "guarded." *Ibid*.

On July 25, 2001, Claimant was treated by Dr. Laura K. Knox at the University of Virginia Hospital Chronic Wound Care Clinic. CX 30. Dr. Knox noted, *inter alia*, an impression of decreased sensation of the foot and ankle after a crush injury, thinning tissues peripherally, and "a lateral ankle ulcer and a foot ulcer both from pressure and sheer." *Ibid*.

Claimant was seen by Dr. Merrick on May 30, 2002. CX 27. Examination revealed three "new decubitus ulcers on his [left] foot" caused by friction and an inability to distribute weight evenly over the foot as a result of Claimant's "industrial accident." *Ibid*.

According to an October 9, 2002 letter from Dr. Lewis V. Owens, a vascular surgeon affiliated with Charlottesville Radiology Ltd., Claimant had evidence of arterial insufficiency but the most significant component of his wound healing inability was a problem with constant pressure on his foot and ankle area due to his right ankle fusion which resulted in recurrent ulceration. CX 37. Claimant previously underwent right foot debridement of skin, muscle, subcutaneous tissue, and bone performed on July 11 and August 13, 2002 by Dr. Owens. *Id*. Post-surgery treatment notes reflect an inability to heal and discussions regarding the future possible need for leg amputation. *Id.*

An October 20, 2002 opinion letter from Dr. Collette Moussalli states that Claimant is not able to ambulate and requires a motorized wheel chair for movement within his house and that the device is needed as a result of Claimant's ankle injury rather than his diabetes. CX 38. The letter further notes that Claimant needs accommodations made to his vehicle so he would be able to leave the house with his wheelchair. *Ibid*. Dr. Moussalli opined that Claimant's ulcerations and osteomyelitis were not attributable to his diabetic condition, but were, rather, "due to his initial injury requiring fusion of the ankle which led to the sensory changes in the right foot . . . [and] the improper positioning of the ankle . . . contributed to the development of these ulcerations and subsequently osteomyleitis." *Ibid*.

On October 25, 2002, Dr. Merrick was deposed by Claimant's attorney. CX 32. Dr. Merrick testified that he received his medical degree from the Medical College of Virginia at Virginia Commonwealth University, completed a residence in family practice at Harrisburg Hospital in Pennsylvania, and became board-certified in family practice in 1996. *Id*. at 5, 51. He is licensed in the State of Virginia and a clinical professor at the University of Virginia and at the Medical College of Virginia in Richmond. *Id*. at 6. He has written on the use of opioids for treatment of chronic pain and assisted in the development of guidelines for the use of opioids which were subsequently used as the basis for guidelines established nationally by the Federal of Medical Boards. *Id*. at 6-7, 10.

Dr. Merrick began treating Claimant in August 1996 after Dr. van der Sommen retired. *Id*. at 14. Claimant's initial complaint related to chronic pain resulting from injuries sustained in industrial accidents in 1979 and 1980. *Id*. at 17. Claimant sustained a crush injury to his right lower extremity when a piano pinned him against a wall, and his right ankle was reinjured when he jumped a guardrail to avoid being struck by an oncoming car. *Id*. at 18. Dr. Merrick opined that Claimant's chronic pain contributed to his depression and anxiety, and his inability to exercise as a result of his ankle injury, degenerative arthritis of the spine, and enthesopathy of the hips and pelvic girdle, worsened, and possibly accelerated, his diabetes by contributing to weight gain. *Id*. at 20-27. Similarly, Dr. Merrick opined that Claimant's hypertension was at least partially a result of his chronic pain and psychological problems. *Id*. at 29. With respect to Claimant's ankle fusion, Dr. Merrick stated that his altered gain has created decubitus or pressure ulcers which are aggravated by his diabetes. *Id*. at 30-32. Other recurring problems found by Dr. Merrick to be associated with Claimant's ankle fusion, chronic pain, diabetes, and ulcers included osteomyelitis and cellulitis which might require a below-the-knee amputation. *Id*. at 32-35, 64-65. His altered gait also was believed to have aggravated his spinal condition and enthesopathy of the hips. *Id*. at 39. It was a combination of the 1979 and 1980 injuries which caused or aggravated the other conditions. *Id*. at 61-62. Dr. Merrick believed that Claimant's

condition would continue to deteriorate unless he went through with the proposed below-the-knee amputation, and attributed his ability to stay out of a nursing home to the daily care provided by his wife and family. *Id*. at 40-42, 47-48, 72-75. Claimant's depression, anxiety, diabetes, and hypertension were then under control, but Dr. Merrick believed within a reasonable degree of medical certainty that Claimant was totally disabled and had been since August 1996. *Id*. at 42-44, 60-61, 63, 75-76. He also believed it would be beneficial for Claimant to have a van capable of transporting him and a motorized scooter where he needs to go. *Id*. at 45-47, 70-71. Other medical treatment records of Claimant reviewed by Dr. Merrick include records of: Dr. van der Sommen from May 1988; Drs. Dratkin and Louder from August 1987 and Mary 2000; Dr. Clifford Hinkes from January 1983, and August – September 1984; Nurse Betty Overbey dated November 2, 1988. *Id*. at 53-55. Dr. Merrick treats Claimant for conditions unrelated to his injuries including COPD, chronic bronchitis, and hypercholesterolemia. *Id*. at 58.

Sections 13 and 22 of the LHWCA

In my order for supplemental briefing, I directed the parties to supplement the record in this matter with respect to the proceedings surrounding their June 1988 Stipulation. I further ordered them to address the issue of whether, in light of the Supreme Court's decision in *Intercounty Const. Corp. v. Walter*, 422 U.S. 1 (1975) and the Board's decision in *Seguro v. Universal Maritime Serv. Corp.*, USDOL/OALJ Reporter (HTML), BRB Nos. 01-0542, 01-0542A (Mar. 18, 2002) ("*Seguro*"), this matter should be adjudicated as an original claim under Section 13 of the Act based on the claim filed by Claimant in 1980 or as a modification proceeding subject to Section 22 of the Act.

Employer asserts that this is a modification proceeding based on the fact that the Deputy Director's approval of the parties' June 1988 Stipulation (JX 1) constitutes an award of compensation which may only be modified pursuant to Section 22 of the Act. Employer's Supplemental Post-Hearing Brief ("Emp. Supp. Br.") at 3. According to Employer, prior to reaching the agreement embodied in the Stipulation, the parties disputed the nature and extent of Claimant's disability, the matter was thereafter referred to the Office of Administrative Law Judges for resolution, an agreement was reached, the matter was remanded by the administrative law judge to the Deputy Commissioner, and the Deputy Commissioner thereafter approved the parties' agreement embodied in the Stipulation. *Ibid*.

Claimant asserts that no formal compensation order has ever been requested or issued with respect to his February 20, 1980 injury, and the Stipulation which he signed "was simply a memorialization of the continuance of voluntary payments by the employer." Supplemental Brief of Claimant, John Milliner ("Cl. Supp. Br.") at 1-2. He notes that Employer made voluntary payments of temporary total disability benefits in this case until November 26, 1986 when such payments were terminated. *Id*. at 2. He thereafter filed a request for a formal hearing, no hearing was held because "the carrier agreed to resume paying temporary total disability benefits to claimant, and the matter was remanded by Judge Holmes back to the Deputy Commissioner, where a stipulation memorializing the carrier's agreement to continue voluntary payments was filed and Deputy Commissioner Janice Bryant *approved* the same." *Ibid*. (italics added). He further states that no compensation order was either sought or entered

and the Stipulation "was simply an acknowledgment that the *status quo ante* would resume and claimant would begin again receiving voluntary payments of temporary total disability." *Ibid*.

On June 15, 1988, Claimant, his attorney Gerald C. Baker, and Employer's and Carrier's attorney Samuel F. McNeill, III signed a two-page stipulation in which the parties stipulated and agreed, *inter alia*, that: Claimant sustained an injury to his right foot on February 21, 1980 in the course of his employment with Employer; his average weekly wage and compensation rate at that time were $821.40 and $426.26, respectively; and Employer and Carrier would pay temporary total benefits from November 26, 1986 to June 16, 1988 "and continuing subject to change in claimant's medical condition and/or vocation rehabilitation status in accordance with the Act." JX 1 at 1. The Stipulation further provided that Employer and Carrier would pay all reasonable and necessary medical and vocational expenses and pay Claimant's attorney's fee in the amount of $2,500.00. *Id*. at 1-2. The matter was thereafter remanded to the Office of Workers' Compensation Programs by Administrative Law Judge John C. Holmes that same day "for appropriate action pursuant to the Stipulation." *Milliner v. Lion Transfer & Storage Co*., 88-DCW-84 (June 15, 1988)(Order). On June 24, 1988, Deputy Commissioner Janice V. Bryant signed and attached to the parties' Stipulation a document in which she acknowledged receipt of the Stipulation, directed the parties to file a Form LS-208 ("Notice of Final Payment or Suspension of Compensation of Payments") with the Office of Workers' Compensation when all payments had been made in accordance with the Stipulation, and approved an award of $2,500.00 in attorney's fees to Claimant's attorney.

For the reasons stated below, I find that Deputy Commissioner Bryant's approval of the parties' Stipulation was an award of compensation, and this proceeding is thus governed by Section 22 of the Act.

Claims for disability compensation under the Act are filed with, and generally adjudicated by, the district director in the compensation district in which the injury occurred. *See* 20 C.F.R. § 702.221(a) (2003). Whenever an employer controverts entitlement to benefits, or stops or suspends payment of compensation made to a claimant without an award of compensation, the district director must "make such investigations, . . . or hold such hearings, and take such further action as he considers will properly protect the rights of all parties." 33 U.S.C. § 914(h)(2); *see also* 20 C.F.R. §§ 702.234, 702.251, 702.252. In recognition of the fact that "the problem giving rise to the controversy [in the vast majority of cases] results from misunderstandings, clerical or mechanical errors, or mistakes of fact or law . . . district directors are empowered to amicably and promptly resolve such problems by informal procedures." 20 C.F.R. § 702.301 (2003). They are "empowered to resolve disputes with respect to claims in a manner designed to protect the rights of the parties and also to resolve such disputes at the earliest practicable date." 20 C.F.R. § 702.311. The district director is expressly authorized to do so "by informal discussions by telephone or by conferences at the district director's office . . . [or] by written correspondence." *Ibid*. When resolution of the claim occurs either by phone or correspondence, the regulations provide:

> Where the problem was of such nature that it was resolved by telephone discussion or by exchange of written correspondence, the parties shall be notified by the same means that agreement was reached and the district director shall

> prepare a memorandum or order setting forth the terms agreed upon. In either instance, when the employer or carrier has agreed to pay, reinstate or increase monetary compensation benefits, or to restore or appropriately change medical care benefits, such action shall be commenced immediately upon becoming aware of the agreement, and without awaiting receipt of the memorandum or the formal compensation order.

20 C.F.R. § 702.315(a) (2003). Only if the claim is not resolved through these informal procedures is the matter then referred to the Office of Administrative Law Judges for formal adjudication. *See* 20 C.F.R. §§ 702.316, 702.317 and 702.331, *et seq*. (2003). Thereafter, whenever the parties reach an agreement with respect to the claim and no longer controvert the issues to be adjudicated at the formal hearing, they may advise the administrative law judge of that fact, and the administrative law judge "shall halt the proceedings . . . and forthwith notify the district director who shall then proceed to dispose of the case as provided for in § 702.315." 20 C.F.R. § 702.351 (2003).

After Claimant's February 1980 work injury, Employer, through its Carrier, voluntarily paid temporary total disability compensation to Claimant until November 25, 1986. Cl. Supp. Br. at 2. Carrier then stopped making payment of compensation effective November 26, 1986, and Claimant thereafter sought to have his benefits reinstated, first at the district director level, and subsequently in a formal hearing before an administrative law judge. *Ibid*. While the case was before Administrative Law Judge John Holmes, the claim was amicably resolved without a formal hearing, the parties entered into a written stipulation setting forth their agreement with respect to the issues presented, and Judge Holmes ordered that the claim be returned to the district director for disposition. *Ibid*. Consistent with the informal procedures for adjudicating claims described above, the agreement was thereafter approved by Deputy Commissioner Bryant as evidenced by the June 24, 1988 document attached to the parties' Stipulation in which she acknowledged its receipt and approved the payment of Claimant's attorney's fee. JX 1. There was no need for her to issue a formal compensation order since the parties' Stipulation and her acknowledgement of receipt together constituted a memorandum setting forth the terms agreed upon by the parties. 20 C.F.R. § 702.315(a) ("district director shall prepare *a memorandum or order* setting forth the terms agreed upon") (italics added). Indeed, her approval of an award of attorney fees is itself recognition of the fact that she adjudicated Claimant's continuing entitlement to temporary total disability benefits after Employer terminated such benefits. *See* 33 U.S.C. § 928 (award of attorney fees only made to claimant for services of attorney in successful prosecution of claim); *see also* 20 C.F.R. § 702.134 (2003).

Claimant's argument that the *Seguro* and *Intercounty Const. Co.* decisions require that this matter be treated as an initial claim rather than a modification proceeding under Section 22 of the Act is also unpersuasive. Neither case presented a situation similar to the facts in this case, nor did those cases precisely address the issue presented here.

In *Seguro v. Universal Maritime Service Corp*., *supra*., the claimant sustained a work-related injury to his knee in 1987 and sought benefits under the Act. His employer agreed that the claimant was permanently totally disabled when the case was before the district director, and the only issue raised then was whether the employer was entitled to Section 8(f) relief. When the

district director denied such relief, the employer requested a formal hearing and the case was transferred to the Office of Administrative Law Judges. The case was assigned to Administrative Law Judge Chao and employer again stipulated to permanent total disability. Judge Chao thereafter issued a decision on October 30, 1987 denying the employer's request for Section 8(f) relief. In his decision, he noted the employer's stipulation "but did not incorporate an award of benefits to claimant into his order." *Id*. at 2. He further noted that the only issue raised was the employer's entitlement to Section 8(f) relief.

Judge Chao's decision was appealed by the employer to the Board, and the Board affirmed the administrative law judge's decision.[5] The employer thereafter sought modification under Section 22 alleging that the claimant was capable of engaging in suitable alternate employment despite its earlier stipulation. It also moved for a partial summary decision at that time declaring that there was no final compensation award by Judge Chao in his October 30, 1987 decision and order. On March 5, 1999, Administrative Law Judge Ainsworth Brown granted Employer's motion for summary decision holding that there was no compensation award in place. The employer thereafter stopped making payments of disability compensation to the claimant on March 10, 1999, and the claimant appealed Judge Brown's decision to the Board. The appeal was dismissed as interlocutory.

The case was reassigned, and Administrative Law Judge Paul Teitler thereafter held a hearing on the employer's request for modification. Judge Teitler subsequently issued a decision and order in which he found Judge Chao's decision "effectively served as a compensation order and that the parties stipulated that claimant was permanently and totally disabled." *Ibid*. Judge Teitler also found that the employer could seek modification of the earlier stipulation pursuant to Section 22 of the Act based on a change in the claimant's condition and found medical and vocational evidence supported such a change. He subsequently issued two orders on reconsideration relating to issues not relevant to this proceeding. The claimant and the employer thereafter appealed the prior decisions of Judges Brown and Teitler.

The Board, *inter alia*, affirmed Judge Brown's determination that Judge Chao's 1987 decision was not a final compensation order awarding permanent total disability benefits. It thus determined that Section 22 of the Act was not applicable to that proceeding "as the initial claim for benefits had never been the subject of a final formal compensation order prior to the adjudication by Judge Teitler." *Id*. at 3. The Board further wrote:

> Although the parties agreed that claimant was entitled to permanent total disability benefits, the district director did not issue a compensation order pursuant to 20 C.F.R. § 702.315. . . . Judge Chao noted the parties' stipulations and found that the only issue in dispute was employer's entitlement to Section 8(f) relief. However, he did not incorporate the parties' stipulations into a formal order. Moreover, he addressed only employer's request for Section 8(f) relief in his decision."

Ibid. It went on to say:

---

[5] *Seguro v. Universal Maritime Service Corp*., BRB No. 87-3680 (Sept. 9, 1992).

> Contrary to Judge Teitler's conclusion, there is no provision in the Act or the regulations for a "voluntary order" unless the parties' agreement is embodied in a formal order issued by the district director or administrative law judge. *See* 33 U.S.C. §919(c); 20 C.F.R. §§702.315, 702.348; *see generally Gupton v. Newport News Shipbuilding & Dry Dock Co*., 33 BRBS 94 (1999). Moreover, voluntary payments by an employer do not equate to a final order. An order can be issued based on the parties' stipulations, or after the administrative law judge adjudicates a claim, but this did not occur in this case. Judge Chao's decision neither awards nor denies benefits. As no final compensation order was ever issued in this case, the claim before the administrative law judge must be viewed as an initial claim for compensation."

Id. at 3-4.

It is clear from the Board's description of the procedural history of the claim in *Seguro* that neither party contested the issue of the claimant's entitlement to total disability compensation when the case was before the district director or the ALJ. On the contrary, the only issue considered and decided in both instances was whether the employer was entitled to Section 8(f) relief. Entitlement to total disability compensation was thus never adjudicated.

Here, unlike the situation presented in *Seguro*, when the case came before the district director and the ALJ, the *only* issue under consideration was Claimant's entitlement to total disability benefits. When that issue was ultimately resolved by mutual agreement of the parties at the ALJ level, the claim was remanded to the district director. Pursuant to § 702.315, which allows for the district director's preparation of a memorandum or order setting forth the terms agreed upon, Deputy Commissioner Bryant reviewed the terms under which total disability benefits were to be paid, and she accepted those terms as evidenced by her signature on the document attached to the parties' stipulation.

Similarly, the Supreme Court's decision in *Intercounty Const. Co*. *v. Walter*, *supra*., does not support Claimant's position. In that case, the claimant was injured in 1960 while working for the District of Columbia government and filed a claim for total permanent disability benefits. Although the carrier admitted that the injury occurred in the course of employment, it denied that the claimant had suffered a permanent disability. However, it began paying compensation for total disability without any compensation award by the deputy commissioner. In 1965, the carrier filed a notice of controversion regarding the extent of the claimant's disability and simultaneously reduced its voluntary payments of compensation to a fifty percent rate. A claims examiner held a hearing on the claim for total permanent disability benefits in 1966, but the "hearing was adjourned without action on the claim." *Id*., 422 U.S. at 4. The Carrier thereafter stopped payments of compensation on January 23, 1968, since the amount it had paid by that date equaled its maximum liability under the Act for a fifty percent disability. On February 11, 1970, two years later, the claimant requested a hearing on his claim for total permanent disability. "Although the claim had been pending since its timely filing in 1960, neither the carrier nor the claimant had requested action by the Bureau in the intervening 10 years to adjudicate its merits and no order or award had been entered during this period resolving it." *Id*. at 5. The deputy commissioner thereafter granted benefits and issued an order awarding

permanent total disability. The employer sought to enjoin enforcement of the award, and the District Court granted summary judgment in favor of the employer "holding that Section 22 of the Act barred the claim." *Ibid*. The Court of Appeals for the D.C. Circuit reversed, holding that Section 22 was "applicable only to the power of the deputy commissioner to modify prior orders, [and it] erected no barrier to consideration of claims which had not been the subject of a prior order by the deputy commissioner." *Ibid*.

The sole issue presented in *Intercounty Const. Co*. was whether Section 22 of the Act barred consideration of a claim timely filed under Section 13 of the Act when that claim had not been the subject of an order issued by the deputy commissioner within one year after the cessation of voluntary compensation payments. *Id*. at 3. In discussing the history of Section 22, the Court noted that, prior to amendment, that section "provided power to the deputy commissioner to modify a prior order only 'during the term of an award' and the provision was construed to constrict the power to modify a previous order to the period of payments pursuant to an award." *Id*. at 8. The Court rejected the employer's argument that an amendment to Section 22 in 1934, which inserted the phrase 'whether or not a compensation order has been issued,' was intended to apply the one-year time limit also added to the statute to all pending claims. The Court wrote:

> Taken in historical and statutory context, the phrase "whether or not a compensation order has been issued" is properly interpreted to mean merely that the one-year time limit imposed on the power of the deputy commissioner to modify existing orders runs from the date of final payment of compensation even if the order sought to be modified is actually entered only after such date.

Id. at 11. It went on to state: "Whatever the merits of a fixed period for resolution of pending compensation claims not previously the subject of an order, Congress did not in Section 22 establish such a period." *Id*. at 12.

Again, the facts of *Intercounty Const. Corp.* are substantially different from those presented here. There, the employer voluntarily paid total disability compensation after the claim was filed in 1960, but then disputed the level of disability in 1965 and reduced payments it was making to the fifty percent level. In 1968, it stopped making payments when the amount paid on the claim reached the maximum amount of compensation due for a fifty percent disability. Two years later, the claimant requested a hearing on his claim for total disability and total disability was awarded. At no point before Deputy Commissioner Walter "entered an order awarding claimant compensation for permanent total disability" was there any order or award of compensation to the claimant. The issue presented to, and decided by, the Court was whether Section 22 imposed on the deputy commissioner a one-year limitation period following an employer's cessation of voluntary payments within which to take action on a pending claim. The Court found it did not, and agreed with the D.C. Circuit that Section 22 "is applicable only to the power of the deputy commissioner to modify prior orders and awards issued by him." *Id*. at 5.

In this case, Claimant filed his claim in 1980, Employer made voluntary payments of compensation until 1986, it then disputed Claimant's entitlement to total disability benefits, that issue was presented to the deputy commissioner for resolution, and Claimant thereafter requested

a formal hearing when the issue was not favorably decided. The parties subsequently reached an agreement on that issue, and they embodied their agreement in a Stipulation which was remanded to, and approved by, Deputy Commissioner Bryant. The Stipulation and attachment signed by Deputy Commissioner Bryant, consistent with the informal adjudication provisions of § 702.315, constituted a memorandum of Claimant's entitlement to temporary total disability benefits under the terms specified therein. Unlike *Intercounty Const. Co*., there was thus an award of temporary total disability in place when the instant proceeding commenced.

Timeliness of Permanent Total Disability Claim

Employer concedes that "Claimant is currently permanently and totally disabled. Emp. Br. at 7. Employer argues, however, that Claimant did not request permanent total disability within one year of the date of disability, and his claim is therefore untimely. Emp. Br. at 10. According to Employer, a claim must be "filed within one year of the date of disability or death, or within one year of the last payment of voluntary benefits," and thus asserts that because Claimant did not "raise his claim within one year of becoming permanently totally disabled," it should be considered untimely. *Id*. According to Employer, the one-year time limit is intended to "prevent the revival of stale claims where evidence has been lost, memories have faded, and witnesses have disappeared," and those concerns are present in this claim. *Id*. Employer argues further that it would be prejudiced if Claimant were allowed to pursue permanent total disability compensation at this juncture because, assuming Claimant satisfies his *prima facie* burden to show he cannot return to his pre-injury employment, it cannot conduct a "retroactive" labor market study to show that Claimant is capable of performing suitable alternate employment. *Id*. at 11.

As Employer correctly notes, Claimant did not request permanent total disability within one year of the date of disability as required in the first sentence of Section 13(a) of the Act. However, as determined above, this is not an initial claim for compensation under Section 13 of the Act, but is instead a claim for modification governed by Section 22 of the Act which permits the filing of a claim at any time prior to one year after the date of the last payment of compensation based on a change in condition. 33 U.S.C. § 922. Pursuant to the parties' agreement, Deputy Commissioner Bryant awarded temporary total disability compensation in 1988 "continuing subject to change in claimant's medical condition and/or vocational rehabilitation status in accordance with the Act." JX 1. Accordingly, I find that the claim filed by Claimant in this proceeding is timely.

Date of Permanent Total Disability

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. *See Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235, fn. 5 (1985); *Trask v. Lockheed Shipbuilding Construction Co.,* 17 BRBS 56, 60 (1985); *Stevens v. Lockheed Shipbuilding Company*, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record and is not dependant on economic factors. *See Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). Where the medical evidence

indicates that the claimant's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for a judge to find that maximum medical improvement has been reached. *See Dixon v. Cooper Stevedoring Co.*, 18 BRBS 25, 32 (1986). However, the mere possibility of surgery, by itself, does not preclude a finding that claimant's condition is permanent. *See Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 202 (1986).

An injured worker's impairment may be found to have changed from temporary to permanent under either of two tests. *See Eckley v. Fibrex & Shipping Co.*, 21 BRBS 120, 122-23 (1988). Under the first test, a residual disability, partial or total, will be considered permanent if, and when, the employee's condition reaches the point of maximum medical improvement. *See James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985). Thus, an irreversible condition is permanent per se. *See Drake v. General Dynamics Corp., Elec. Boat Div.*, 11 BRBS 288, 290 n.2 (1979). The date of the diagnosis of an irreversible medical condition is the date of permanency. *See Crouse v. Bath Iron Works Corp.*, 33 BRBS 442 (ALJ) (May 4, 1999). Under the second test, a disability will be considered permanent if the employee's impairment has continued for a lengthy period and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969). *See also Crum v. General Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984) (physician's evaluations of claimant indicated that his heart condition, although improved, was of indefinite duration); *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781-82 (1st Cir. 1979); *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248, 251 (1988). In such cases, the date of permanency is the date that the employee ceases receiving treatment, with a view toward improving his condition. *See Leech v. Service Eng'g Co.*, 15 BRBS 18, 21 (1982).

Claimant asserts that he "attained permanency in 1984, after his ankle fusion." Cl. Br. at 13. He bases that assertion on Dr. Hinkes' statement that Claimant had "reached maximum medical benefit" and had a "stable" operative fusion as of September 17, 1984. *Ibid*. citing CX 2 at 7. While that statement might support a finding of permanency with respect to a *partial* disability of Claimant's right lower extremity, it clearly does not support a finding that Claimant was then permanently and *totally* disabled. Furthermore, with respect to the issue of permanent total disability, it is inconsistent with the parties' Stipulation of June 15, 1988 in which they agreed Claimant was, at that time, temporarily totally disabled.

In contrast, Employer asserts that Claimant's "medical condition would have had to decline after reaching the [June 1988] Stipulation, and the first note of any decline in his condition occurred in October 1992 when Dr. van der Sommen wrote prescriptions for a full-length mirror while driving due to severe degenerative joint disease causing diminished cervical spine rotation, as well as a shower chair and elevated toilet seat due to poor balance and pain. Emp. Br. at 14. Employer further argues that "a labor market survey would be required to make a definitive determination as to whether the Claimant was not permanently and totally disabled after the change in condition occurred." *Id*. at 15. Employer's assertion that Claimant's condition would have to decline after June 15, 1988 is incorrect. The issue with respect to when

Claimant's condition had become *permanent* is not based on whether his condition had gotten worse after June 1988. Rather, that determination is based on whether his condition continued to fluctuate thereafter or had, by that time, become stable and was not subject to improvement. *See, e.g., Trask*, 17 BRBS at 60; *Mason v. Bender Welding & Mach. Co*., 16 BRBS 307, 309 (1984), *Rivera v. National Metal & Steel Corp*., 16 BRBS 135, 137 (1984). Furthermore, it is the medical evidence which determines permanency, without regard to economic or vocational considerations, not, as Employer suggests, consideration of a labor market survey. *Ballesteros*, 20 BRBS at 186; *see also Berkstresser v. Washington Metro Area Transit Auth*., 16 BRBS 231, 234 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990) (evidence of ability to do alternative employment not relevant to determination of permanency).

As the Board has previously noted:

> As a general rule, stipulations made by parties are binding upon those who made them. *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84 (1985). Stipulations are offered in lieu of evidence and thus may be relied upon to establish an element of the claim. *See generally Williams Electronics, Inc. v. Artic Int'l, Inc.*, 685 F.2d 870 (3d Cir. 1982).

Ramos v. Global Term. & Container Services, Inc., 34 BRBS 83, 84 (1999). The Board thus found that a 1990 stipulation by the parties in which they agreed that the claimant was permanently and totally disabled established the claimant's condition as of that time. *Ibid*.

In this case, the parties stipulated that Claimant's disability was both total and temporary as of June 16, 1988. JX 1. The record before me supports the parties' Stipulation with regard to Claimant's condition on June 16, 1988. I thus find that Claimant was temporarily totally disabled at that time. Therefore, the next issue to be considered is when Claimant's disability became permanent.

As noted above, the date on which a claimant's condition has become permanent is primarily a medical determination. *Abbott*, 40 F.3d at 122; *Ballesteros*, 20 BRBS at 186; *Williams*, 10 BRBS at 915. The medical evidence of record relating to Claimant's condition shortly before June 16, 1988 and thereafter shows the following:

Claimant was examined May 10, 1988 by Dr. Lyn van der Sommen. CX 15. As a result of his decreased ability to weight bear on his right foot and his right leg length discrepancy, she determined that "compensatory" neck and back imbalances had developed in Claimant's muscles and he had probable non-alignment of facet joints at both levels. Dr. van der Sommen wrote:

> I feel this patient needs on-going fairly intensive physical therapy to retard deterioration of his overall condition. As well, hopefully these seconda[r]y developments could be reversed [i]f partially corrected.

Ibid.

On March 1, 1989, Claimant was examined by Dr. Albert Jones. CX 20, 21. He found no relationship between Claimant's hypertension or diabetes and his work injury, and, although he could not give a definitive opinion regarding whether his ankle injury led to his degenerative back problems, stated "I think it very reasonable that his altered gait pattern would contribute to mechanical back pain." *Ibid*. He opined that Claimant was unable to physically engage in any type of manual labor and "doubted" that his education or background would allow him to do anything else. *Ibid*. He also concluded that Claimant's prognosis for vocational rehabilitation was poor. *Ibid*.

According to a November 1, 1990 letter from Dr. van der Sommen, Claimant was totally disabled by the chronic pain and instability of his right ankle. CX 17. She further noted that "[a] low back disorder had subsequently resulted as well from gait dysfunction to compensate for his poor ankle stability." *Ibid*. Claimant's condition had not changed and treatment at that point was for general health with "no surgery anticipated or available for the degenerating condition of his affected joints." *Ibid*. Based on his multiple physical disabilities, his emotional state, and "his very limited ability to read and write," Dr. van der Sommen concluded that Claimant was totally and permanently disabled. *Ibid*.

Dr. Randolph Merrick began treating Claimant in August 1996. CX 24. His treatment notes reflect, *inter alia*, a diagnosis of severe chronic back pain from the cervical to lumbar spine due to degenerative arthritis resulting from Claimant's work injury. A January 23, 1997 treatment report noted that recent MRI's "showed incredible spinal stenosis, especially in the cervical MRI, at the point where he is probably going to have symptoms of severe spinal stenosis with compromise of his lower extremities as well as upper extremities." *Ibid*. He noted that Claimant became emotional during the interview when he realized "he is going to get worse and he is looking at existence in a wheelchair." *Ibid*. In a June 24, 1997 letter, Dr. Merrick wrote that Claimant was unable to perform any tasks that required prolonged sitting, standing, or bending, and there was nothing from a surgical or medical point which might improve his condition. CX 25. Other treatment notes dated from March 1999 through January 2001, outlined above, include notations of chronic pain syndrome, recurrent diabetic foot ulcers secondary to physical therapy and foot deformity related to the industrial accident, depression, and arthritis in the spine and lower extremities. CX 24. An August 24, 2001 letter from Dr. Merrick attributes Claimant's degenerative disc disease and arthritis in the spine to his work injury, and opines that his depression and anxiety were exacerbated by his chronic pain. CX 26. He described Claimant's prognosis as "guarded," and said he would have required placement "in an assisted living facility such as a nursing home" if his family had not assisted him with his activities of daily living. *Ibid*. In his October 25, 2002 deposition, Dr. Merrick stated that Claimant's chronic pain contributed to his depression and anxiety, and his inability to exercise as a result of his ankle injury, degenerative arthritis of the spine, and enthesopathy of the hips and pelvic girdle worsened, and possibly accelerated, his diabetes by contributing to weight gain. CX 32. He also attributed Claimant's osteomyelitis and cellulitis to his ankle fusion, chronic pain, diabetes, and ulcers, and noted that Claimant might need a below-the-knee amputation. Dr. Merrick testified that Claimant was totally disabled and had been since he began treating him in August 1996. *Ibid*.

An October 20, 2002 opinion letter from Dr. Collette Moussalli states that Claimant is unable to ambulate as a result of his ankle injury and requires a motorized wheel chair for movement within his house. CX 38. She also attributed his ulcerations and osteomyelitis to his initial injury requiring fusion of the ankle which led to sensory changes in the foot and improper positioning of the ankle. *Ibid*.

The above-cited evidence demonstrates that Claimant's condition fluctuated to some degree between 1988 and 1989. On May 10, 1988, Claimant was examined by Dr. van der Sommen with respect to complaints of neck and back pain which she found had "developed because of his decreased ability to weight bear on his right foot, his right leg length discrepancy, fatigued muscles secondary to this imbalance and overall stress-induced muscle contraction of his neck and back." CX 15 at 66. She stated that Claimant needed intensive physical therapy to retard, and "hopefully" reverse or partially correct these secondary conditions. *Id*. at 66-67. She also noted that Claimant had an appointment with a neurologist in Richmond, Virginia whose "subspecialty is cervical and lumbar evaluation and realignment and he has been quite successful in the past assisting other patients with similar pain and problems." *Id*. at 67. In a letter to Dr. van der Sommen dated January 27, 1989, Betty Overbey, R.N., a "Case Management Consultant," notes that approval had recently been obtained from Carrier to have Claimant evaluated by a physician specializing in rehabilitation medicine and that such an evaluation would soon be scheduled with Dr. Alfred Jones. CX 20. Dr. Jones thereafter conducted an independent medical evaluation of Claimant on March 1, 1989. CX 22. With respect to Claimant's back problems, he recommended a rehabilitative program of exercise to promote maximum lumbar flexibility and erect posture, an isometric strengthening program, massage, and heat applications using a cloth towel dipped in paraffin wax. *Id*. at 123. He further wrote, with respect to his potential for employment: "His only work has been hard manual labor all his life and I think it highly unlikely that he has the potential to return to any type of manual labor." *Ibid*. A "progress report" from Nurse Overbey dated April 7, 1989 notes that "many of the recommendations in Dr. Jones's report have already been implemented" CX 19. She further wrote that "Dr. Jones's report also serves to support our original impression that Mr. Milliner has limited potential for vocational rehabilitation" and closed the file based on instructions from the Carrier. *Ibid*. Dr. van der Sommen wrote in a letter to Carrier dated November 1, 1990, that Claimant "has been totally disabled by the chronic pain and instability of his right ankle." CX 17. She went on to note that he had developed a low back disorder as a result of his ankle instability and gait dysfunction and, "[w]ith his limited educational abilities he has been totally and permanently disabled." *Ibid*. She noted also that there had been no change in Claimant's right ankle and low back conditions and she did not expect any. *Ibid*.

Based on the foregoing, it is apparent that Dr. van der Sommen expected that Claimant's condition might improve after May 1988. It is also clear that, based on Dr. Jones' examination of Claimant on March 1, 1989, he believed it was "highly unlikely" that Claimant could ever return to his former employment or any other employment involving manual labor. Dr. Jones' assessment was later confirmed by Claimant's treating physician, Dr. van der Sommen, in her letter of November 1, 1990.

In its post-hearing brief, Employer asserts that Dr. van der Sommen acknowledged in her November 1, 1990 letter that she lacked the ability to determine whether Claimant was

temporarily or permanently disabled by virtue of the fact that "she would recommend vocational rehabilitation if it were available." Emp. Br. at 6. Employer's reliance on this statement, taken out of context, is misplaced. Dr. van der Sommen clearly believed that Claimant's condition was not going to improve and he was totally and permanently disabled.[6] In consultation with Claimant's physical therapist, she attempted to, but could not, envision any employment situation in which Claimant could function. CX 17.

Since there is no medical evidence which suggests that Claimant's condition was subject to improvement after Dr. Jones' March 1, 1989 evaluation, I find Claimant reached maximum medical improvement on that date. I thus find that he was permanently and totally disabled as of March 1, 1989.

Entitlement to Cost of Living Adjustments

The LHWCA provides that compensation for injuries resulting in permanent total disability or death shall be adjusted annually to reflect the rise in the national average weekly wage. 33 U.S.C. § 910(f). Based on the 1984 Amendments to the Act, 98 Stat. at 1648, annual adjustments are limited to the lesser of the yearly increase of the national average weekly wage or 5 percent. Section 10(f) benefits are not applicable to temporary total disability benefits. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981).

Employer conceded prior to the date of his death that Claimant was permanently and totally disabled. Emp. Br. at 7. As discussed above, the medical evidence of record reflects that there was a change in Claimant's condition from temporary total disability to permanent total disability as of March 1, 1989. Claimant is thus entitled to cost of living adjustments under Section 10(f) of the Act from March 1, 1989 until the time of his death.

Payment for Medical Services Provided by Wife

Claimant seeks "payment to Mrs. Milliner, claimant's wife, for provision of medically necessary treatment services to care for his medical conditions and to care for him personally, because both of these are necessary and causally related to his disability." Cl. Br. at 15. According to Claimant, an award of $8.00 per hour for 56 hours per week (8 hours per day, 7 days per week) is appropriate. *Ibid*. In his supplemental post-hearing brief, he states that "an award reflecting 12 hours of time per day is a fair compromise between the 8 hours a day total that claimant's wife and his son provide services to him, and the 24 hours during which they must be present and available to render care." Cl. Supp. Br. at 6. Claimant also submitted a four-page document from Nursing Referral Service of Northern Virginia, Inc. which notes rates ranging from $40.50 per hour for a registered nurse to $16.00 to $18.00 per hour for a certified nursing assistant. CX 40. The exhibit also reflects rates for a live-in certified nursing assistant ranging from $150 to $170 per day for a single patient. *Ibid*.

[6] As noted above, she stated that "[t]here has been no change in this disability . . . nor do I expect any." CX 17. She also wrote that Claimant had been "reasonably stable this past year," and that there was "no surgery anticipated or available for the degenerating condition of his affected joints." *Ibid*.

Employer acknowledges that payment for medical services rendered by Claimant's wife are, under certain circumstances, appropriate and compensable under the Act. Emp. Br. at 20. It argues, however, that there has been no home evaluation by an Occupational Therapist to assess Claimant's abilities and needs, and there is no documentation to support the Claimant's need for the particular services provided by his wife. *Ibid*. In its supplemental brief, Employer adds that "[a]t no time, even to the present, has the Claimant and/or his treating physician issued a request to the Carrier to provide the services that he claims his wife is providing." Emp. Supp. Br. at 5. It further states, "until a request is made and the Carrier refuses to provide services in accordance with the orders of the Claimant's treating physician, the Carrier cannot be required to reimburse the Claimant's wife for such services, including those that have already been provided." *Id*. at 6.

Dr. Merrick began treating Claimant in August 1996 after Dr. van der Sommen retired. CX 32 at 14. He testified during his deposition that he believed Claimant's condition would continue to deteriorate unless he went through with a proposed below-the-knee amputation, and he attributed Claimant's ability to stay out of a nursing home to the daily care provided by his wife and family. *Id*. at 40-42-47-48, 72-75. In an August 24, 2001 letter to Claimant's attorney, Dr. Merrick wrote that Claimant required "almost full care for help in bathing and moving as he is restricted in both motion of his back and his neck, as well as the pain from the degenerative right ankle, as well as the arthritis that it has caused in his knees, hips, low back." CX 26 at 164. He also wrote that Claimant was "well cared for by his wife and family members who seek to meet his needs from the standpoint of activities of daily living." *Ibid*. With respect to Claimant's care, he concluded:

> In summary, these original accidents have certainly required the patient to have continued assistance from his family for activities of daily living and I applaud their efforts or else the patient would have certainly have to be taken care of in an assisted living facility such as a nursing home. I believe that failure to completely provide for the patient's needs as a result of this accident and infirmities, and disability, has caused the patient and his family a lot of hardship and hope that further care of this individual by those responsible will be more forthcoming and deliberate. . . .

Id. at 165.

During the formal hearing in this matter, Claimant testified about the nature and extent of the care he routinely received from his wife. He described, for example, one occasion when his wife was cleaning a pressure sore on his right feet "and a big piece of meat fell off the bottom of it." Tr. 38. He also testified that he had a wheelchair which he used to get from his bed to the bathroom in his house and back, that he could use the wheelchair outside, and that he had "been in the house for three to four years before they got me a wheelchair." Tr. 42. He testified that he could also use the wheelchair, which is electric, to get to the dining room and the kitchen, but not the living room. Tr. 48. Claimant testified that he was able to dress himself but required the assistance of his son to transfer himself from one wheelchair to another. Tr. 49.

Claimant's wife testified that she had "to help him pretty much do everything, from put his underwear on to . . . because he can't let go with one arm and, you know. He's in bad

shape." Tr. 56. She also testified that Claimant had an approximately 5 millimeter cut where his doctor removed a bone and she had to clean it and change the dressing on it every day. Tr. 57. She described her daily routine as:

> I get up. I start the coffee pot at 6:00. I go in and get my husband ready to give him treatment, his IV treatment every 6 hours. So I get him prepped and him hooked up to the IV and get his treatment going, and then I go back – I go in and get a glass of ice water for each one of us and I get a cup of coffee. So I bring his coffee back, and I watch [the IV] until it gets done and then I have to –
>
> . . . .
>
> I watch it until it, you know, gets down until it runs almost all the way out and then I leave a little bit in the fold, about that much, and then shut it off.
>
> . . . .
>
> I have to flush his IV lines.
>
> . . . .
>
> I take a sterile saline needles and I have to flush his – he has a –
>
> . . . .
>
> [His IV is more or less on a permanent basis u]ntil it heals up. It'll have to be until it heals up.
>
> . . . .
>
> And that's because the osteomyelitis is so serious a disease. The doctor doesn't want to take any risk of him taking him off of the antibiotic and putting him on an oral one.
>
> . . . .
>
> Then I have to count out all his medications and give them to him.
>
> . . . .
>
> [T]hen I fix him something to eat and he has to have something to eat on top of all those medications. So I either cook him something, you know, that he wants or give him a bowl of cereal or whatever, you know, he wants [about 7:00 am].
>
> . . . .
>
> Sometimes I – if he goes back to bed, I'll jump back in bed, too, yeah, until about 11:00 and then I get up and get ready for the next go around and I more or less stay up after that because a lot of times it'll be 12:00 that he usually eats some lunch and then gets back in bed. Sometimes I – if he goes back to bed, I'll jump back in bed, too, yeah, until about 11:00 and then I get up and get ready for the next go around and I more or less stay up after that because a lot of times it'll be 12:00 that he usually eats some lunch and then gets back in bed.
>
> . . . .
>
> He has to take [his IV] like every 6 hours. So it would be 6:00, 12:00, 6:00, 12:00. At 6:00 in the evening every night, we have to change the lines, you know, his lines and change the bag and everything, you know. So everything gets switched around. He has to flush his lines twice – twice before and twice after. So – that's because you're using a new line I guess. And they want to keep the lines open. We flush both the gray line and the red line because the red line, they don't use it but they can use it for withdrawing blood or things like that if they have to give him an injection, they can use the red line. But the gray line they use

> all the time. And I usually have to wait up until 11:00 or 12:00 at night to give him treatment at night.
> . . . .
> [A]nd then I give him all his nighttime medicine, . . .

Tr. 58-62. She further described the process involved in cleaning and dressing Claimant's foot wherever sores developed and where he had a toe amputated. Tr. 65-66. She testified that Claimant needed assistance since the time of his injury, but stated that "he hasn't been needing the severe services like I've been giving him but for the last I'd say five years, he's been needing pretty much because he started getting blow outs [i.e., the rupture of boils which developed] about four or five years ago." Tr. 68. She testified that she did the "same work on his foot as a skilled nurse would do" based on training she received from Dr. Merrick. Tr. 73. She subsequently testified, however, that a nurse came out and did it one time and from then on she did it because "they only come once a week because they try to make it a little easier on the insurance company." *Ibid*. She estimated that it took approximately 45 minutes to treat him after getting up at 6:00 am. Tr. 74. In terms of direct care on a daily basis, she estimated that she spent about 8 hours tending her husband seven days per week. Tr. 76-77.

Section 7(a) of the Act, states:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a). The Board has previously held that the phrase "other attendance" in the statute includes certain essential domestic services that a claimant is no longer capable of performing because of his work-related injury. *Gilliam v. The Western Union Telegraph Co*., 8 BRBS 278 (1978). The Board has further determined that employers are liable for reasonable and necessary home care related to a claimant's work-related disability. *Id*., *Carroll v. M. Cutter, Co.,* 37 BRBS 134 (BRB Nos. 03-0189 and 03-0189A)(Oct. 30, 2003); *Falcone v. General Dynamics Corp*., 21 BRBS 145 (1988); *Timmons v. Jacksonville Shipyards, Inc.*, 2 BRBS 125 (1975); *see also Edwards v. Zapata Offshore Co*., 5 BRBS 429 (12977); *Director, OWCP v. Gibbs Corp*., 1 BRBS 40 (1974); 20 C.F.R. § 702.412(b). Fees charged for such services are limited to the prevailing community rate. 20 C.F.R. § 702.413.

A claim for medical benefits under Section 7 of the Act is never time-barred. *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). However, that section expressly provides that an employee is not entitled to recover any amount expended by him for medical or other treatment or services unless, *inter alia*, the employer has refused a request to furnish such services. 33 U.S.C. §7(d)(1). In the Form LS-18 filed July 5, 2002 by Claimant, he expressly sought an order directing Employer and Carrier to pay, *inter alia*, "the reasonable value of nursing services provided by his wife." Claimant's LS-18 clearly put Employer on notice that he was requesting reimbursement for the reasonable value of his wife's services as of July 5, 2002. Nothing in the record suggests that Employer has paid any such expenses since that date.

As noted above, Claimant's counsel, in his post-hearing brief, initially argued that an order awarding Claimant $8.00 per hour for 56 hours per week of his wife's time was appropriate. Cl. Br. at 15. In his supplemental post-hearing brief, however, he requested an award reflecting 12 hours per day as "a fair compromise between the 8 hours a day total that claimant's wife and his son provide services to him, and the 24 hours during which they must be present and available to render care." Cl. Supp. Br. at 6. Since Claimant has never previously requested reimbursement from Employer for any services provided to him by anyone other than his wife, no award for the son's services is appropriate. However, based on the statements of Dr. Merrick that Claimant would require placement in an assisted living facility, such as a nursing home, if it were not for the care provided by his wife, I find that reimbursement for the services of a live-in attendant is appropriate. I further find that the services provided by Claimant's wife are analogous to those which one might expect from a live-in certified nursing assistant.[7] Since Claimant's wife is not a professional health care provider, it would be inappropriate to reimburse the costs of her time at the $170 per day maximum noted in CX 40 for a certified nursing assistant. However, Employer could reasonably be expected to pay $150 per day for the services of a live-in certified nursing assistant to care for Claimant in the event his wife elected not to do so. Employer will therefore be required to reimburse Claimant $150 per day beginning July 5, 2002 through the date of Claimant's death. In light of the fact that Claimant's wife testified there were some days when nursing care was actually provided to Claimant in his home, Employer is entitled to a credit for any in-home nursing services provided to Claimant and paid for by Employer from July 5, 2002 to the date of Claimant's death.

Claimant's Death

As noted above, Claimant's counsel informed me that Claimant died "over night between February 2 and 3, 2004." Section 19(f) of the LHWCA provides:

> (f) An award of compensation for disability may be made after the death of an injured employee.

33 U.S.C. § 919(f). *See Andrews v. Alabama Dry Dock & Shipbuilding Co.*, 17 BRBS 209, 211 (1985); *Wilson v. Vecco Concrete Constr. Co.*, 16 BRBS 22, 25 (1983). The right to disability compensation survives the employee's death, and his survivors have standing to file a claim for benefits on his behalf. *Maddon v. Western Asbestos Co.*, 23 BRBS 55, 59 (1989); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 830, 831-32 (1978).

ORDER

On the basis of the foregoing, IT IS HEREBY ORDERED that:

[7] The daily rates reflected in CX 40 for a live-in certified nursing assistant for one patient range from $150 to $170. Employer had ample opportunity to submit evidence which might have provided an alternative basis for determining the prevailing community rate for such services, but none was ever submitted. Based on the undisputed evidence before me, I therefore find that the fees set forth in CX 40 are reasonable and consistent with requirement that reimbursable expenses be based on the prevailing community rate.

A. Lion Transfer & Storage Company and Fireman's Fund Insurance Company shall pay Claimant permanent total disability compensation benefits, with cost of living adjustments made pursuant to Section 10(f) of the Act, from March 1, 1989 to the date of Claimant's death based on an average weekly wage of $821.40.

B. Lion Transfer & Storage Company and Fireman's Fund Insurance Company shall receive credit for all amounts of compensation previously paid to Claimant as a result of his work-related injuries identified herein.

C. Lion Transfer & Storage Company and Fireman's Fund Insurance Company shall also pay to Claimant all medical benefits to which he is entitled under Section 7 of the Act, including reimbursement at the rate of $150 per day from July 5, 2002 to the date of Claimant's death for the services of his wife.

D. Lion Transfer & Storage Company and Fireman's Fund Insurance Company shall received credit for all amounts of in-home nursing care provided to Claimant from July 5, 2002 to the date of his death.

E. Lion Transfer & Storage Company and Fireman's Fund Insurance Company shall pay to Claimant's attorney fees and costs to be established by supplemental order.

F. The district director shall perform all calculations necessary to effect this order.

SO ORDERED.

A

STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.